

Denver Law Review

Volume 74 | Issue 1

Article 9

January 2021

The Crime of Property: Bennis v. Michigan and the Excessive Fines Clause

R. Todd Ingram

Follow this and additional works at: <https://digitalcommons.du.edu/dlr>

Recommended Citation

R. Todd Ingram, The Crime of Property: Bennis v. Michigan and the Excessive Fines Clause, 74 Denv. U. L. Rev. 293 (1996).

This Note is brought to you for free and open access by the University of Denver Sturm College of Law at Digital Commons @ DU. It has been accepted for inclusion in Denver Law Review by an authorized editor of Digital Commons @ DU. For more information, please contact jennifer.cox@du.edu, dig-commons@du.edu.

COMMENT

THE CRIME OF PROPERTY: *BENNIS V. MICHIGAN* AND THE EXCESSIVE FINES CLAUSE

INTRODUCTION

Eight years ago, Tina Bennis called the police in a frantic attempt to locate her husband.¹ John Bennis had not returned from work to the Michigan couple's residence in Royal Oak, a relatively secure suburb of Detroit.² The next day, Ms. Bennis discovered that her husband was in the custody of Detroit police and became understandably upset when police informed her that her husband had solicited a prostitute.³ She was even more shocked to find that the couple's 1977 Pontiac had been taken from them, not by joy-riding kids or a car-theft ring, but by the state of Michigan.⁴ The Detroit Police Department had her car, intended to sell it, and might give her nothing in the process.⁵

Law enforcement agencies employ forfeiture as a tool to solve a myriad of social problems, ranging from illegal importation of uncertified car engines to animal abuse to waste disposal.⁶ Since 1981, government agencies instituted more than 200,000 forfeiture actions.⁷ Furthermore, the federal government confiscated cash and property valued at an unprecedented \$1.9 billion in 1993.⁸ Due to the lucrative nature of forfeiture, the prevalent questionable enforcement tactics seriously compromise individual rights.⁹

1. Debra Saunders, *High Court Takes Low Road on Forfeiture*, DET. FREE PRESS, Mar. 13, 1996, at 9A.

2. *Id.*

3. Margaret Trimer, *Police Begin to Seize Cars in Prostitution Crackdown*, DET. FREE PRESS, Oct. 5, 1988, at 6A (quoting Tina Bennis, "I guess I'm glad to know he's alive, . . . Wait until I pick him up, . . . I'll talk to him . . . and maybe wring his neck.").

4. *Id.*

5. *Id.* (quoting a Michigan official comparing the vehicle forfeiture program to the doctrine of "caveat emptor" —let the buyer beware).

6. See James E. Beaver et al., *Civil Forfeiture and the Eighth Amendment After Austin*, 19 SEATTLE U. L. REV. 1, 9-10 nn.51-52 (1995) (citing 40 C.F.R. § 85.1513(c) (1994) (dealing with the forfeiture of uncertified engines); FLA. STAT. ANN. § 403.413(5)(e) (West 1993) (dealing with the forfeiture of waste disposal equipment); LA. REV. STAT. ANN. § 14:102.2(B) (West 1986) (dealing with the forfeiture of abused animals) and a multitude of other federal and state provisions).

7. Sarah N. Welling & Medrith Lee Hager, *Defining Excessiveness: Applying the Eighth Amendment to Civil Forfeiture After Austin v. United States*, 83 KY. L.J. 835, 837 (1994-95).

8. Terrence G. Reed, *On the Importance of Being Civil: Constitutional Limitations on Civil Forfeiture*, 39 N.Y.L. SCH. L. REV. 255, 269 (1994) (citing United States Department of Justice figures).

9. See *id.* For example, in 1992, federal, state, and local law enforcement officials raided

Unfortunately, courts are often powerless to combat such abuse due to the broad latitude enjoyed by law enforcement entities in pursuing a potential criminal's property.¹⁰

Traditionally, innocent owners of confiscated property possess ineffective constitutional ammunition to contest civil forfeitures. Courts grew increasingly concerned with the plight of innocent property owners, however, as the scope of civil forfeiture schemes widened. Many forfeitures exceeded traditional goals of forfeiture,¹¹ with their intent to punish the property owner, thereby implicating the Due Process Clause's prohibition against punishment of innocent citizens. In the early 1990's, the Supreme Court took an increasingly critical approach to this nation's rapidly expanding forfeiture schemes, affording renewed hope to innocent owners that their property would not be unfairly confiscated.¹² The Supreme Court reversed this trend, however, in its recent examination of civil forfeiture in *Bennis v. Michigan*.¹³ This Comment analyzes the Court's decision regarding the forfeiture of Ms. Bennis's car despite the fact that she committed no crime.

Part I examines the origin of forfeiture and outlines the significant precedent. Part II summarizes the *Bennis* decision, paying particular attention to the critical concurrence authored by Justice Thomas. Part III analyzes the *Bennis* decision, arguing that *Austin v. United States*¹⁴ should have controlled in *Bennis* because of the punitive nature of Michigan's forfeiture scheme. Part III then presents varying "excessiveness" tests suggested in the wake of *Austin*, concluding that the forfeiture of Tina Bennis's car was unconstitutionally "excessive." Part IV concludes this Comment by placing the *Bennis* decision in contemporary social context. It argues the Supreme Court

the 200 acre California ranch of Donald Scott under the suspicion that Mr. Scott was growing marijuana. Mr. Scott was shot to death after brandishing a gun to defend his property against the perceived trespassers. "A district attorney concluded that 'the Los Angeles County Sheriff's Department was motivated, at least in part, by a desire to seize and forfeit the ranch for the government.'" Michael Fumento, *Hey, That's Mine! Don't Take Property from Innocent Owners*, DET. FREE PRESS, Jan. 30, 1996, at 9A.

10. See Beaver, *supra* note 6, at 5 (discussing the *Scott* case, in which the Ventura County District Attorney's report concluded that no legal impropriety existed as long as the executed search warrant was supported by probable cause, a relatively easy burden of proof); see Welling & Hager, *supra* note 7, at 838 (noting that governments rarely charge the potential claimant with a crime). "Courts felt unable to control law enforcement agencies, given the permissive language of the statutes and the presumed inapplicability of most constitutional protections in the civil context." *Id.* at 839.

11. See *infra* notes 27 to 44 and accompanying text.

12. See Robert M. Sondak, *The Tide Is Turning: Civil Forfeiture Law Is Becoming More Accommodating to Innocent Owners and Innocent Mortgagees*, 48 CONSUMER FIN. L.Q. REP. 178 (1994) (predicting that lending institutions will be more likely to receive compensation when financed property has been confiscated); see, e.g., *United States v. 92 Buena Vista Ave.*, 507 U.S. 111 (1993) (extending the statutory innocent owner defense to individuals receiving a gratuitous transfer of criminal proceeds); *United States v. James Daniel Good Real Property*, 510 U.S. 43 (1993) (requiring the government to afford notice and an adversarial hearing to a claimant prior to the seizure of real property under federal drug statute); *Republic Nat'l Bank v. United States*, 506 U.S. 80 (1992) (rejecting the government's argument that jurisdiction over confiscated money is lost once such money is deposited into the U.S. Treasury).

13. 116 S. Ct. 994 (1996).

14. 509 U.S. 602 (1993).

erroneously adhered to an antiquated legal fiction and compromised basic due process guarantees.

I. BACKGROUND

A. *Origin*

Forfeiture is "a divestiture of specific property without compensation [which] imposes a loss by the taking away of some preexisting valid right."¹⁵ Early cultures demanded that items causing death or injury be forfeited and destroyed.¹⁶ "[I]f an ox gore a man or a woman, and they die, he shall be stoned and his flesh shall not be eaten."¹⁷ Forfeiture grew from the belief that an object was "morally affected."¹⁸ In order to "appease God's wrath," proceeds of sale from forfeited property benefitted the poor and needy.¹⁹

English common law eventually adopted the "guilty property" theory of forfeiture.²⁰ Deodands were values forfeited to the Crown because an object, in some manner, caused the death of a citizen.²¹ England abolished deodands in 1846.²² Until 1870, English common law also required convicted felons to surrender all real and personal property.²³

Civil statutory forfeiture endured. Historically, objects used in violation of customs or revenue laws were subject to statutory, or *in rem* forfeiture.²⁴ While America never adopted England's deodand and criminal forfeiture schemes, civil statutory forfeiture survived the American Revolution.²⁵ State admiralty courts after the Revolution continued the colonial practice of *in rem* proceedings against vessels or cargo engaged in illegal trade or piracy.²⁶ The "guilty property" fiction circumvented the inefficient process of identifying owners of ships or cargo that resided overseas.²⁷ Similarly, giving the object a legal identity enabled enforcement of the laws without regard for the actual

15. BLACK'S LAW DICTIONARY 650 (6th ed. 1990).

16. Susanne H. Bales, Note, *Constitutional Law—Fifth Amendment Right to Due Process—Civil Forfeiture Defendants and Constitutional Protection*, 62 TENN. L. REV. 331, 335 (1995).

17. *Calero-Toledo v. Pearson Yacht Leasing Co.*, 416 U.S. 663, 681 n.17 (1974) (quoting *Exodus* 21:28).

18. Steven V. Miller, *So What Rights Does a 1972 HMET Mobile Home Have Anyway? In Austin v. United States, the Supreme Court Applies the Excessive Fines Clause to In Rem Civil Forfeitures*, 23 CAP. U. L. REV. 797, 800 (1994) (citing *Parker Harris Co. v. Tate*, 188 S.W. 54, 55 (Tenn. 1916)).

19. *Id.* (citations omitted) (inferring that governments often retained the proceeds despite philanthropic goals).

20. See Bales, *supra* note 16, at 335 (citations omitted).

21. *Calero-Toledo*, 416 U.S. at 680-81. "Deodand derives from the Latin *Deo dandum*, to be 'given to God.'" *Id.* at 681 n.17.

22. Bales, *supra* note 16, at 335. Deodands retreated from view after the emergence of the wrongful death action. *Id.*

23. *Id.*

24. See Miller, *supra* note 18, at 801 (stating that courts in American colonies often enforced English statutes through *in rem* forfeitures).

25. Bales, *supra* note 16, at 336.

26. Matthew P. Harrington, *Rethinking In Rem: The Supreme Court's New (and Misguided) Approach To Civil Forfeiture*, 12 YALE L. & POL'Y REV. 281, 292 (1994).

27. *Id.* at 286.

guilt of the owner.²⁸ However, the owner was permitted to appear and contest the proceedings against the property.²⁹

Generally, three types of property are subject to forfeiture: "contraband," or property which is legislatively determined to be illegal to own, export, or import;³⁰ "instrumentalities," or property used in furtherance of criminal activity;³¹ and "proceeds," or the profits of crime.³² Civil forfeiture actions ask a court to determine ownership of the property in question, rather than declare its criminal "guilt."³³ An *in rem* proceeding occurs after a statutory violation designates the property "guilty" and therefore forfeited.³⁴ In simply finding that a proper forfeiture had already materialized,³⁵ prosecutors avoid significant procedural hurdles and obtain absolute title to the property in question.³⁶

B. Forfeiture and The Innocent Owner

In the 1800's, the United States Supreme Court addressed two major admiralty cases which laid the foundation for American civil forfeiture jurisprudence. *The Palmyra*,³⁷ decided in 1827, confirmed that a forfeiture proceeding was against the property itself.³⁸ In *Harmony v. United States*,³⁹ the Court rejected the "innocent owner" defense for *in rem* proceedings.⁴⁰ By reasserting the "guilty property" fiction, the Court found that civil forfeiture was the best method to immediately redress harmful activity and ensure that property used in furtherance of a crime would not escape the grasp of law enforcement.

Innocent owners have since challenged the seizure of their property on various grounds.⁴¹ The Supreme Court expanded its rationale for rejecting the

28. *Id.*

29. *Id.* at 285, 303 (discussing how civil forfeiture classification provides prosecutors with an often decisive edge over their targets).

30. Bales, *supra* note 16, at 335. Contraband "includes items such as adulterated food, sawed-off shotguns, narcotics, and smuggled goods." *Bennis v. Michigan*, 116 S. Ct. 994, 1004 (1996) (Stevens, J. dissenting).

31. Bales, *supra* note 16, at 335. Instrumentalities are tools which a "wrongdoer has used in the commission of a crime," including such things as guns, cars, boats, and fishing nets. *Bennis*, 116 S. Ct. at 1004-07 (Stevens, J., dissenting).

32. Bales, *supra* note 16, at 335. Proceeds traditionally encompassed only stolen property but has been expanded to include certain earnings of illegal transactions. *Bennis*, 116 S. Ct. at 1004 (Stevens, J., dissenting).

33. Harrington, *supra* note 26, at 286-87 (explaining that the *in rem* process is independent of an *in personam* suit).

34. *Id.*

35. *Id.*

36. *Id.* at 303 (noting that *in rem* actions permit a reduced burden of proof, relaxed rules of evidence, and extinguish the claims of third party lienholders).

37. 25 U.S. (12 Wheat.) 1 (1827).

38. *Id.* at 14 (holding forfeiture of the vessel proper regardless of the piracy convictions of the crew).

39. 43 U.S. (2 How.) 210 (1844) (upholding forfeiture of a vessel even though the ship's captain acted against the orders of the vessel's owner).

40. *Id.* at 334.

41. See Beaver, *supra* note 6, at 12; see, e.g., *J. W. Goldsmith-Grant Co. v. United States*, 254 U.S. 505 (1921) (holding that the federal tax fraud forfeiture statute in question did not

innocent owner defense in *Van Oster v. Kansas*.⁴² The *Van Oster* Court held certain uses of property so undesirable that one relinquishing control of such property does so at his or her peril.⁴³ Therefore, the law eliminates potential evasions made possible if collusion between the owner and the user was required.⁴⁴

Almost a half-century later, in *Calero-Toledo v. Pearson Yacht Leasing Co.*,⁴⁵ the Court upheld the forfeiture of a leased boat upon which one marijuana cigarette was found.⁴⁶ The *Calero-Toledo* Court addressed whether an "innocent" lessor could be sanctioned in this manner.⁴⁷ In dictum, the Court suggested that if a property owner proved that he or she was not involved in the proscribed activity, had no knowledge the user would engage in such activity, and had taken all reasonable steps to ensure proper use of the property, such property was not confiscable.⁴⁸

In 1993, the Supreme Court decided *Austin v. United States*.⁴⁹ In *Austin*, the state unsuccessfully attempted to confiscate a mobile home and commercial garage from which an individual sold cocaine.⁵⁰ The *Austin* Court conducted an extensive inquiry into the history of forfeitures in American jurisprudence.⁵¹ The Court found that forfeitures consistently serve a punitive purpose,⁵² explaining that "innocent" owners are punished for their negligent entrustment of property.⁵³

In reaching this conclusion, the *Austin* Court analyzed the legislative history of the Eighth Amendment's Excessive Fines Clause.⁵⁴ The Court's unprecedented holding that the Eighth Amendment applied to both criminal and civil proceedings⁵⁵ dismayed some observers.⁵⁶ The *Austin* Court's

violate the Fifth Amendment as applied to an innocent owner); *Dobbins's Distillery v. United States*, 96 U.S. 395 (1877) (forfeiting leased real estate upon which an illegal distillery was operated without the knowledge of the lessor).

42. 272 U.S. 465 (1926) (upholding Kansas's seizure of an entrusted vehicle allegedly used to transport alcohol).

43. *Id.* at 467. The individual driving the forfeited car was ultimately acquitted of the Prohibition-era liquor transportation charges. The *Van Oster* Court recognized this acquittal, but still denied the innocent owner's claim. *Id.* at 466.

44. *Id.* at 467-68. "So here the legislature, to effect a purpose clearly within its power, had adopted a device consonant with recognized principles and therefore within the limits of due process." *Id.* at 468.

45. 416 U.S. 663 (1974).

46. *Id.* at 693 (Douglas, J., dissenting in part) (1974) (suggesting "harsh" law should be tempered with constitutional protection where the offense appears minor).

47. *Id.* at 685-87.

48. *Id.* at 689-90.

49. 509 U.S. 602 (1993).

50. *Austin*, 509 U.S. at 627-28 (holding that the property was not an "instrumentality" of the offense).

51. *Id.* at 610-22.

52. *Id.* at 614-15.

53. *Id.* at 615.

54. *Id.* at 608-09. "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted." U.S. CONST. amend. VIII.

55. *Austin*, 509 U.S. at 607-08.

56. See Harrington, *supra* note 26, at 332-36 (criticizing the *Austin* Court's "apparent disregard of the distinction between forfeitures *in rem* and those *in personam*").

revolutionary reading of the Excessive Fines Clause subjected punitive civil measures to a proportionality review.⁵⁷

To some, the *Austin* decision muddled the waters in forfeiture proceedings.⁵⁸ While recognizing a greater historical basis for a constitutionally grounded innocent owner defense such as was suggested in *Calero-Toledo*,⁵⁹ the *Austin* Court refused to endorse a specific test to determine whether a forfeiture is "excessive."⁶⁰ This refusal left lower courts uncertain about the scope of governmental forfeiture power.⁶¹ Just three years later, Tina Bennis's misfortune provided the opportunity for the Court to clarify this scope.

II. BENNIS V. MICHIGAN

A. Facts and Procedural History

On October 3, 1988, Detroit police officers arrested John Bennis for gross indecency after observing Mr. Bennis engaged in a sexual act with a prostitute.⁶² Mr. Bennis committed this offense in the front seat of the 1977 Pontiac that he co-owned with his wife, Tina Bennis.⁶³ After Mr. Bennis's misdemeanor conviction, the Wayne County prosecutor filed a complaint alleging that the 1977 Pontiac was a public nuisance subject to abatement.⁶⁴ Tina Bennis objected to the abatement proceeding, claiming her interest in the vehicle was not subject to forfeiture because she lacked any knowledge that her husband would use the vehicle to solicit a prostitute.⁶⁵ The trial court rejected Ms. Bennis's claim, declared the Pontiac a public nuisance, and abated Ms. Bennis's interest in the car.⁶⁶

57. *Austin*, 509 U.S. at 622. "We therefore conclude that forfeiture . . . constitutes 'payment to a sovereign as punishment for some offense,' and, as such, is subject to the limitations of the Eighth Amendment's Excessive Fines Clause." *Id.*

58. See Welling & Hager, *supra* note 7, at 851-90 (analyzing the varying excessiveness tests employed in state and federal courts).

59. *Austin*, 509 U.S. at 617-18.

60. *Id.* at 622-23. "Prudence dictates that we allow the lower courts to consider that question in the first instance." *Id.*

61. See Welling & Hager, *supra* note 7, at 844-85 (indicating that different jurisdictions restrict the *Austin* decision to certain types of property and utilize many versions of the excessiveness test).

62. *Michigan ex rel. Wayne County Prosecutor v. Bennis*, 527 N.W.2d 483, 486 (Mich. 1994), *aff'd*, 116 S. Ct. 994 (1996).

63. *Id.*

64. *Id.* Abatement of a nuisance is defined as "[t]he removal, stoppage, prostration, or destruction of that which causes a nuisance." BLACK'S LAW DICTIONARY 1066 (6th ed. 1990). The applicable Michigan statutes provide in relevant part: "[a]ny building, vehicle, boat, aircraft, or place used for the purpose of lewdness, assignation or prostitution or gambling, or used by, or kept for the use of prostitutes . . . is declared a nuisance . . . and all . . . nuisances shall be enjoined and abated." MICH. COMP. LAWS ANN. § 600.3801 (West Supp. 1996). "If the existence of the nuisance is established in an action as provided in this chapter, an order of abatement shall be entered as a part of the judgment in the case, which order shall direct . . . the sale thereof in the manner provided for the sale of chattels under execution . . ." MICH. COMP. LAWS ANN. § 600.3825 (West 1996).

65. *Bennis*, 527 N.W.2d at 486.

66. *Id.*

The Michigan Court of Appeals reversed the trial court decision,⁶⁷ holding that Ms. Bennis's innocence precluded the abatement of her interest in the vehicle.⁶⁸ In a 4-3 decision the Michigan Supreme Court reversed the court of appeals and reinstated the trial court's order for abatement.⁶⁹ The state supreme court determined that Michigan's failure to provide Ms. Bennis with an innocent owner defense was without federal constitutional consequence.⁷⁰ The Supreme Court of the United States granted certiorari⁷¹ and affirmed the decision of the Michigan Supreme Court.⁷²

B. Supreme Court Decision

1. Majority Opinion

The Court framed the issue in this case as whether Michigan's abatement scheme violated either Tina Bennis's Fourteenth Amendment right of due process or the Fifth Amendment Takings Clause.⁷³ Chief Justice Rehnquist stated that Ms. Bennis could not claim a due process violation based solely on her alleged lack of involvement in her husband's activity.⁷⁴ The Court supported this decision by explaining that Ms. Bennis was afforded both notice of the abatement and an opportunity to contest such proceeding.⁷⁵ Relying on precedent such as *The Palmyra* and *Harmony*, the Court outlined the traditional notion that the offense attaches to the property in question,⁷⁶ rendering the guilt or innocence of the owner irrelevant.⁷⁷ Finally, the majority stated that civil forfeiture is a legal tool too useful and deeply rooted in American jurisprudence to disturb.⁷⁸

The Supreme Court stated Ms. Bennis had not made a claim beyond that expressed by numerous other "innocent" owners to appear before the Court.⁷⁹ The majority also discounted the innocent owner dicta in *Calero-Toledo*, emphasizing that the case's *holding* supports the majority opinion.⁸⁰

67. *Id.*

68. *Id.* at 486-87.

69. *Id.* at 486.

70. *Id.* at 495.

71. *Bennis v. Michigan*, 115 S. Ct. 2275 (1995).

72. *Bennis*, 116 S. Ct. at 998. Chief Justice Rehnquist delivered the majority opinion in which Justices O'Connor, Scalia, Thomas, and Ginsburg joined. *Id.* Justices Thomas and Ginsburg filed concurring opinions. Justice Stevens filed a dissenting opinion, joined by Justices Souter and Breyer. Justice Kennedy filed a separate dissenting opinion. *Id.* at 996. Ms. Bennis's petition for rehearing was denied on April 22, 1996. *Bennis v. Michigan*, 116 S. Ct. 1560 (1996).

73. *Bennis*, 116 S. Ct. at 997-98.

74. *Id.* at 998.

75. *Id.*

76. *Id.*

77. *Id.* (quoting *Dobbins's Distillery*, 96 U.S. at 401).

78. *Id.* at 999.

79. *Id.*

80. *Id.* (citing *Kokkonen v. Guardian Life Ins. Co. of America*, 114 S. Ct. 1673, 1676 (1994) for the proposition that "[i]t is to the holdings of our cases, rather than their dicta, that we must attend").

The Court found the question of whether the proscribed use of the forfeitable property was its "principal use" immaterial.⁸¹ However, the Court reserved the question presented by Justice Stevens regarding whether *The Palmyra* and its progeny justify confiscation of "an ocean liner just because one of its passengers sinned while on board."⁸²

The majority distinguished recent holdings that arguably justify a culpability requirement in civil forfeitures.⁸³ Chief Justice Rehnquist noted that the *Austin* decision, which held punitive civil forfeitures to be subject to an Eighth Amendment proportionality review, did not apply to this decision.⁸⁴ Specifically, because Michigan's abatement scheme is equitable in nature, the majority found that its remedial focus precluded any punitive intent.⁸⁵

The majority next addressed Ms. Bennis's contention that the abatement of the 1977 Pontiac was a taking of private property for public use in violation of the Fifth Amendment Takings Clause.⁸⁶ The Court rejected this claim, arguing that the Fourteenth Amendment, which applies the Fifth Amendment to the states, was not violated⁸⁷ because Michigan appropriately acquired the vehicle through established governmental authority.⁸⁸

Although the majority recognized the appeal of Ms. Bennis's fairness argument, it found that Michigan's remedial abatement scheme served legitimate societal purposes, was supported by historical precedent, and did not violate Ms. Bennis's constitutional rights.⁸⁹

2. Justice Thomas's Concurrence

Justice Thomas expressed concern regarding the use of civil forfeiture as a means to punish those associated with criminal activity.⁹⁰ The Justice noted that Michigan did not want to prove actual complicity in its abatement scheme: it wanted instead to punish those directly or even remotely connected to the criminal activity.⁹¹ Justice Thomas recognized the apparent unfairness in punishing innocent property owners, but felt compelled to agree with the majority based on the historical acceptance of similar statutes.⁹² "This case is

81. *Id.* at 1000 (addressing the question raised by Justice Stevens in his dissent).

82. *Id.* (quoting Stevens, J., dissenting).

83. *Id.* (discounting *Foucha v. Louisiana*, 504 U.S. 71 (1992), where the Court determined that a criminal defendant may not be punished for a crime if found not guilty of the charge).

84. *Id.*

85. *Id.*

86. *Id.* at 1001. "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V. For an analysis of recent Fifth Amendment Takings jurisprudence, see J. Kelly Strader, *Taking the Wind out of the Government's Sails?: Forfeitures and Just Compensation*, 23 PEPP. L. REV. 449 (1996).

87. *Bennis*, 116 S. Ct. at 1001. "[N]or shall any State deprive any person of life, liberty, or property, without due process of law" U.S. CONST. amend. XIV § 1.

88. *Bennis*, 116 S. Ct. at 1001.

89. *Id.*

90. *Id.* at 1001-03 (Thomas, J. concurring).

91. *Id.* at 1001.

92. *Id.* at 1001-02.

ultimately a reminder that the Federal Constitution does not prohibit everything that is intensely undesirable."⁹³

Additionally, Justice Thomas questioned what it means to "use" property in a manner that might subject the property to forfeit.⁹⁴ Essentially, Justice Thomas suggested that, in the case of an innocent owner, the criteria for determining whether property is an instrumentality should be strictly based on historical standards.⁹⁵ He noted, however, that Ms. Bennis failed to dispute Michigan's allegation that the 1977 Pontiac was an "instrumentality" of Mr. Bennis's offense.⁹⁶

Justice Thomas also noted that the majority's characterization of Michigan's abatement scheme as "remedial,"⁹⁷ avoided the more difficult issues regarding the punishment of innocent parties.⁹⁸ He concluded that it is primarily a duty of federal and state legislatures to prevent the forfeiture of innocent parties' property.⁹⁹

3. Justice Ginsburg's Concurrence

Justice Ginsburg believed the Court's decision rested upon whether Ms. Bennis had a constitutional right to her share of the abatement proceeds, as opposed to a right to the property itself.¹⁰⁰ Finding no such right, Justice Ginsburg expressed reluctance to override the Michigan Supreme Court's decision.¹⁰¹ She concluded that Michigan's forfeiture scheme "deter[s] Johns from using cars they own (or co-own) to contribute to neighborhood blight, and that abatement endeavor hardly warrants this Court's disapprobation."¹⁰²

4. Justice Stevens's Dissent

Justice Stevens recognized the historical prevalence of prostitution and suggested Michigan's abatement scheme was an "experiment" in curtailing such practice.¹⁰³ He believed the majority erroneously relied on unconvincing precedent, ignored Ms. Bennis's complete innocence, and contradicted the opinion delivered in *Austin*.¹⁰⁴

Justice Stevens focused on the forfeitability of criminal instrumentalities, or "derivative contraband."¹⁰⁵ The Justice determined that the "principal uses" of the properties in question historically facilitated the offenses

93. *Id.*

94. *Id.* at 1002.

95. *Id.* "[L]imits . . . become especially significant when they are the sole restrictions on the state's ability to take property from those it . . . does not even suspect[] of colluding in crime." *Id.*

96. *Id.*

97. *Id.* (analyzing Michigan's hypothetical appropriation of forfeiture proceeds).

98. *Id.*

99. *Id.* at 1003.

100. *Id.* (Ginsburg, J., concurring).

101. *Id.* (Ginsburg, J., concurring) (emphasizing the equitable nature of Michigan's forfeiture scheme).

102. *Id.* (responding to Justice Stevens' dissent).

103. *Id.* (Stevens, J., dissenting).

104. *Id.* at 1004.

105. *Id.*

themselves.¹⁰⁶ He believed that the 1977 Pontiac was not an instrumentality in Mr. Bennis's offense, which could have occurred practically anywhere.¹⁰⁷

Justice Stevens's dissent also questioned the Court's characterization of the Michigan forfeiture scheme as remedial.¹⁰⁸ Justice Stevens argued that Mr. Bennis would not necessarily be deterred by the abatement, which suggested a punitive—not remedial—motivation for the forfeiture.¹⁰⁹ The Justice contended the Court's opinion in *Austin* clearly indicated the punitive nature of civil forfeitures.¹¹⁰

Furthermore, Justice Stevens concluded, basic notions of fairness prohibit the punishment of innocent people.¹¹¹ He proposed that civil forfeitures rest "at bottom, on the notion that the owner has been negligent in allowing his property to be misused and that he is properly punished for that negligence."¹¹² Justice Stevens urged that culpability is a basic requirement of due process.¹¹³

Finally, Justice Stevens criticized the majority for contradicting the *Austin* decision.¹¹⁴ The Justice characterized the forfeiture as a violation of the Eighth Amendment Excessive Fines Clause.¹¹⁵ While refusing to set forth a specific test for permissible forfeiture of an innocent person's property, he believed that this case was clearly unconstitutional.¹¹⁶

5. Justice Kennedy's Dissent

While Justice Kennedy recognized the legitimate purposes that *in rem* forfeiture serves in admiralty,¹¹⁷ he found no such legitimate purpose served in Ms. Bennis's case.¹¹⁸ He asserted that the integrity of *The Palmyra* line of cases could be upheld by distinguishing vessels engaged in an unlawful voyage from automobiles tangentially used in crime.¹¹⁹

Additionally, Justice Kennedy did not believe the Court eliminated a culpability requirement in all instances.¹²⁰ Justice Kennedy acknowledged

106. *Id.* at 1005-06 (arguing that prior vehicle forfeiture statutes presented to the Court which prohibited conduct directly related to the vehicle's locomotive capacity, differed from this case, in which the Bennis vehicle's power of locomotion was irrelevant).

107. *Id.* at 1006.

108. *Id.* at 1006-07.

109. *Id.* (emphasizing Michigan's apparent admission that the forfeiture was designed to punish Mr. Bennis and noting that Mr. Bennis allegedly solicited prostitutes in the same area prior to his arrest without a vehicle, and could easily repeat such behavior).

110. *Id.* at 1006-07.

111. *Id.* at 1007 (emphasizing Ms. Bennis' complete lack of involvement in any offense).

112. *Id.* (quoting *Austin*, 113 S. Ct. at 2808).

113. *Id.* at 1008.

114. *Id.* at 1010.

115. *Id.* (concluding that the punitive nature of the Michigan abatement scheme and Ms. Bennis's innocence warranted such a characterization).

116. *Id.*

117. *Id.* (Kennedy, J., dissenting).

118. *Id.* at 1011.

119. *Id.* at 1010-11.

120. *Id.* at 1011.

that regardless of the value of Ms. Bennis's ownership interest in the vehicle, such interest should be protected.¹²¹

III. ANALYSIS

The *Bennis* majority denied Ms. Bennis's constitutional claim by overemphasizing the "guilty property" fiction and then rationalized its holding by incorrectly characterizing Michigan's abatement scheme as solely remedial. The *Bennis* dissenters appropriately declared the forfeiture a violation of constitutional due process, but reduced their effectiveness by misdirecting their arguments.

The following Section argues that due to the punitive nature of Michigan's abatement scheme, the *Austin* decision should have controlled the *Bennis* holding. The Analysis then discusses whether Ms. Bennis could have prevailed under the excessiveness review required by *Austin*.

A. Punitive Nature of Michigan's Abatement Scheme

A punitive statute is one "which creates forfeiture or imposes penalty."¹²² While the guilty property notion coexists with the knowledge that "[i]t is the owner who feels the pain and receives the stigma of the forfeiture, not the property,"¹²³ the *Bennis* Court engaged in semantics to render a decision based on the ancient legal fiction. The *Austin* decision severely criticized the guilty property fiction, generally declaring civil forfeiture to be punitive in nature.¹²⁴ The current Court, however, continues to mold the legal meaning of "punishment" to achieve its desired goals.¹²⁵ One must wonder whether the Framers of our Constitution similarly understood unjust governmental action.¹²⁶ Regardless, the Supreme Court certainly contradicted basic understandings of punishment when it declared Michigan's forfeiture statutes to be non-punitive in nature.

Michigan admitted that the confiscation and eventual forfeiture of the Bennis's vehicle served to effectively punish Mr. Bennis for his illicit

121. *Id.*

122. BLACK'S LAW DICTIONARY 1234 (6th ed. 1990).

123. *United States v. Ursery*, 116 S. Ct. 2135, 2151 (1996) (Kennedy, J., concurring).

124. *Austin*, 509 U.S. at 614-15.

125. See *Ursery*, 116 S. Ct. 2135 (1996). Decided just 15 weeks after *Bennis*, *Ursery* addressed the same civil forfeiture statute declared punitive in *Austin*. The defendant challenged his criminal prosecution based on double jeopardy grounds because the government had previously instituted a "punitive" civil forfeiture action against the defendant's home. The Court distinguished its prior discussions of punishment in *Halper* and *Austin*, restricting *Austin* solely to an Eighth Amendment Excessive Fines analysis and *Halper* to civil penalty cases under the Double Jeopardy Clause. *Id.* at 2145, 2147. "Forfeitures . . . are subject to review for excessiveness . . . after *Austin*; this does not mean, however, that those forfeitures . . . constitute punishment for the purposes of double jeopardy." *Id.* at 2147.

126. At oral argument in *Ursery*, Justice Scalia asked, "I can't understand why somebody who would write a Constitution would think that a punishment is a punishment for one purpose but not another. I mean, if it's punishment enough that you can't make it excessive, why isn't it punishment enough that you shouldn't get it twice?" *United States Supreme Court Official Transcript at 7, United States v. Ursery*, 116 S. Ct. 2135 (1996) (No. 95-345, 346).

behavior.¹²⁷ The statutes which facilitated the abatement were thus concededly punitive in nature.¹²⁸ The statutes subsequently penalized Ms. Bennis through the complete forfeiture of a car which she co-owned. The majority argued that the deterrent aspect of the statute merely reinforces the remedial effect.¹²⁹

Justice Thomas's concurring opinion illustrates the majority's confusion over whether a forfeiture scheme is punitive. The Justice recognized "[t]he State . . . says that it wants to punish . . . persons who . . . may at least have negligently entrusted their property."¹³⁰ Similarly, the Justice noted such "punishment" might violate notions of fairness.¹³¹ He then, inexplicably, followed this apparent admission with a lengthy discussion of why Michigan's abatement scheme was solely remedial.¹³²

Next, Justice Thomas cited the Michigan trial court's conclusion that Ms. Bennis should not be compensated because the proceeds of the vehicle's sale would not exceed, "by much," the attributable costs.¹³³ Justice Thomas inferred that if Michigan retained any portion of the proceeds after all "costs" had been satisfied, the abatement scheme's remedial nature would probably not be altered.¹³⁴ In fact, if Michigan actually retained any amount of the proceeds for non-compensatory reasons, the state action was punitive in nature.¹³⁵

Additionally, Justice Ginsburg's conclusion that Michigan's abatement scheme deters "Johns"¹³⁶ paralleled the Chief Justice's emphasis of the

127. *Bennis*, 116 S. Ct. at 1007 (Stevens, J., dissenting) (citing the plaintiff-appellant's brief).

128. *Id.* at 1000.

129. *Id.*

130. *Id.* at 1001.

131. *Id.*

132. *Id.* at 1002.

133. *Id.*

134. *Id.* In finding that issues regarding punishment of innocent persons do not arise in this case, Justice Thomas wrote:

[t]his is most obviously true if, in stating that there would be little left over after 'costs,' the trial judge was referring to the costs of sale. [E]ven if the 'costs' that the trial judge believed would consume most of the sales proceeds included not simply the expected costs of sale, but also the State's costs of keeping the car and law enforcement costs related to this particular proceeding, the State would still have a plausible argument that using the sales proceeds to pay such costs was 'remedial' action.

Id. at 1002 n.*. Justice Thomas still failed to address the vital question inherent in his argument: What, if any, portion of the proceeds remained after Michigan satisfied all appropriate costs? See *infra* text accompanying note 133.

135. See *Austin*, 509 U.S. at 625 (Scalia, J., concurring in part and concurring in judgment). "However the theory may be expressed, it seems to me that this taking of lawful property must be considered, in whole or in part, punitive. Its purpose is not compensatory, to make someone whole for injury caused by unlawful use of the property." *Id.* (citations omitted). The *Ursery* Court criticized this approach in determining whether a statute was punitive in nature for purposes of the Eighth Amendment Excessive Fines Clause. The Court argued that the second stage of an Excessive Fines evaluation should determine whether the forfeiture was disproportionate either to the offense or to the costs incurred by the government as a result of the offense. To make such an evaluation in the first instance would be repetitive. The *Ursery* Court did not, however, offer guidance as to an appropriate method to determine "punishment" within an Excessive Fines context. See *Ursery*, 116 S. Ct. at 2146-47.

136. *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

abatement statute's "deterrent purpose distinct from any punitive purpose."¹³⁷ As Justice Stevens pointed out, these statements are puzzling in light of *United States v. Halper*,¹³⁸ in which the Court found deterrence *itself* to be an aim of punishment.¹³⁹

Justice Ginsburg's allegiance apparently shifted during this case,¹⁴⁰ while Justice Thomas reluctantly accepted the majority's conclusions.¹⁴¹ In so doing, Justices Ginsburg and Thomas lost the chance to cast the decisive votes in this case and, thereby, uphold due process. Somehow, Justice Thomas ultimately found that "the more severe problems involved in punishing someone not found to have engaged in wrongdoing of any kind [did] not arise."¹⁴²

The *Austin* Court rejected the argument that the Eighth Amendment Excessive Fines Clause does not apply to civil forfeiture proceedings,¹⁴³ and too ambitiously pronounced that all civil forfeitures serve at least partially to punish the property owner.¹⁴⁴ Instead of narrowing the *Austin* Court's declarations to apply only to instrumentalities of crime,¹⁴⁵ the Court in one broad stroke eliminated the only protection left to the innocent owner of "offending" property.

Certain property poses a direct threat to the physical and economic security of society and its members.¹⁴⁶ Confiscation of dangerous property, ensures the safety and stability which is essential to a civilized society.¹⁴⁷ Under the American system, therefore, civil forfeiture statutes removing contraband and proceeds from circulation remedy a situation equally dangerous to

137. *Id.* at 1000.

138. 490 U.S. 435 (1989).

139. *Halper*, 490 U.S. at 448. "[A] civil sanction that cannot fairly be said solely to serve a remedial purpose, but rather can only be explained as also serving either retributive or deterrent purposes, is punishment . . ." *Id.* The *Urserly* Court, also addressing a double jeopardy claim, cited *Bennis* as support for the distinct, non-punitive purpose deterrence serves in civil forfeitures. *Urserly*, 116 S. Ct. at 2149. Justice Stevens uncovered another significant flaw in the majority opinion. The majority compared the effect of Michigan's forfeiture statute on Ms. Bennis to her potential liability had Mr. Bennis negligently injured an individual while driving. *Bennis*, 116 S. Ct. at 1009 (Stevens, J., dissenting). This analogy is rendered moot by the Court's decision in *Browning-Ferris Indus. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), in which it was determined that the Excessive Fines Clause is confined to measures payable to the government, not private individuals. *Browning-Ferris*, 492 U.S. at 260.

140. David G. Savage, *Innocence Punished*, 82 A.B.A. J. 47, 48 (1996) (noting Justice Ginsburg's apparently sympathetic position during oral argument).

141. *Id.* (noting Justice Thomas' recognition of injustice and inability to prevent the harm inflicted upon Ms. Bennis).

142. *Bennis*, 116 S. Ct. at 1002.

143. See *supra* note 54 and accompanying text.

144. *Austin*, 509 U.S. at 618.

145. See Douglas S. Reinhart, Note, *Applying the Eighth Amendment to Civil Forfeitures After Austin v. United States: Excessiveness and Proportionality*, 36 WM. & MARY L. REV. 235, 245-50 (1994) (concluding that "[e]ven without relying on [the guilty property] fiction, the forfeiture of [proceeds] serves the government's remedial interest in removing contraband from public circulation").

146. See Harrington, *supra* note 26, at 348-50 (supporting the "guilty property" fiction for its usefulness in immediately redressing potentially harmful situations).

147. See *id.* "Admittedly, even this type of seizure has always seemed to be at least a technical violation of the Due Process Clause, but courts have countenanced such violations on the grounds that public health concerns outweigh individual rights in exigent circumstances." *Id.* at 349.

each member of society, including the criminal offender.¹⁴⁸ Forfeiture of such property returns society to the state which existed had no crime been committed in the first instance—a constitutionally supportable goal of forfeiture.¹⁴⁹ However, confiscation of *lawful* property used in crime punishes the property owner by eliminating the property's future legal use as well as any potential unlawful use.¹⁵⁰

Michigan diligently emphasized the remedial aspects of its forfeiture scheme.¹⁵¹ The state arguably improved the health and safety of its citizens by seizing a vehicle supposedly contributing to "urban blight" and a weakened local community.¹⁵² The Supreme Court of Michigan also noted that had Mr. Bennis picked up the prostitute and driven to a less notorious part of Detroit, the vehicle would not have been subject to forfeit.¹⁵³ While Justice Stevens condemned this result, it best demonstrates Michigan's effort to remedy the "red light" community's prostitution problem.¹⁵⁴ Intense criticism of valid remedial results undermined the dissent's credibility and diverted the Court's attention away from the forfeiture's plainly punitive purposes.¹⁵⁵

Tina Bennis contributed to the purchase of the vehicle in which Mr. Bennis lawfully commuted to work.¹⁵⁶ Common sense dictates that the deprivation of Ms. Bennis's interest in the vehicle punished Ms. Bennis for an

148. *Id.* at 348-50. Punishment, in any recognizable sense, is not inflicted when an individual forfeits property which one never legally owned. *See* BLACK'S LAW DICTIONARY 1106 (6th ed. 1990) (defining ownership as the "entirety of the powers of use and disposal allowed by law").

149. *See* Roger Pilon, *Can American Asset Forfeiture Law Be Justified?*, 39 N.Y.L. SCH. L. REV. 311, 330-32 (1994) (challenging the "guilty property" fiction based on an individual rights-based argument). Pilon states:

[L]egitimate or justified remedies are forfeitures: to require a wrongdoer to restore the status quo by returning what his action has taken is to require him to 'forfeit' those holdings that are necessary to that end. [F]orfeitures can reach no further than the wrong they are intended to remedy . . . [or] they become excessive.

Id. at 330-31.

150. *See* Reinhart, *supra* note 145, at 248-50 (arguing that Justice Scalia's "substantial connection" test should be used when determining whether a forfeiture of facilitating property was excessive). Under this theory, governments could still immediately confiscate alleged instrumentalities, and, in many cases, retain the entire proceeds of sale to satisfy their costs. Innocent owners would be compensated, however, and governments would simply be required to account for their costs. This Comment argues that any additional "accountability" costs involved in an excessiveness review are outweighed by the greater interest in protecting citizens from unjust punishment.

151. Brief for Respondent at 8-9, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729).

152. *Bennis*, 116 S. Ct. at 1003 (Ginsburg, J., concurring).

153. *Michigan ex rel. Wayne County Prosecutor v. Bennis*, 527 N.W.2d 483, 491 n.22 (Mich. 1994), *aff'd*, 116 S. Ct. 994 (1996).

154. *Bennis*, 116 S. Ct. at 1006 n.9 (Stevens, J., dissenting). Interestingly, Michigan's forfeiture scheme creates a potentially disturbing socioeconomic disparity. Criminals apprehended in less desirable portions of Detroit appear absolutely liable to suffer remedial forfeitures of their property. However, equally offensive criminals discovered in better maintained communities will never incur forfeiture costs. *See id.*

155. *See id.* at 1007 (arguing that Mr. Bennis's ability to repeat this behavior without a car indicates the punitive nature of the forfeiture). While the absence of any deterrent value with regard to Ms. Bennis strengthens the argument that she was punished by the forfeiture, the argument weakens when applied to Mr. Bennis. Michigan has certainly ensured Mr. Bennis will never commit another offense in the forfeited vehicle. *See supra* note 154 and accompanying text.

156. *Id.* at 1008 (suggesting Tina Bennis "is just as blameless as if a thief, rather than her husband, had used the car in a criminal episode").

ultimately unwise "investment."¹⁵⁷ While common sense certainly does not control the action of our nation's highest Court, the *Bennis* majority reached a result blatantly contrary to its reasoning.¹⁵⁸ The Court should have held that Michigan's forfeiture statute served remedial as well as punitive goals.¹⁵⁹

Finally, Michigan admitted that a few "individuals may be . . . harmed by application of state law under its police powers."¹⁶⁰ *Austin* clearly erected a constitutional barrier, however, when such harm results from a punitive civil forfeiture. The *Austin* Court chose to construct an overreaching theory of civil forfeiture in a case specifically addressing the confiscation of alleged instrumentalities of crime. The *Bennis* Court should have held that a civil forfeiture of facilitating property that serves legitimate societal purposes is, at least partially, punitive in nature. By so doing, the Court would have honored the *Austin* Court's extensive inquiry into forfeiture jurisprudence but appropriately limited the *Austin* holding. A correct evaluation would have therefore required the Court to determine whether Ms. Bennis's punishment was constitutionally "excessive."

B. Excessiveness

Ms. Bennis argued to the Court that a property owner should possess a threshold culpability in forfeiture proceedings.¹⁶¹ This was a weak argument, however,¹⁶² because many forfeitures serve solely remedial purposes and do not warrant an excessiveness evaluation.¹⁶³ In *Austin*, the court considered potential excessiveness tests and their relative effectiveness regarding innocent owners.¹⁶⁴ While lower courts have lacked consistency in such evaluations,¹⁶⁵ the Supreme Court could have provided guidance in excessiveness reviews.

1. Proportionality Approach

For example, the Court could have employed a "proportionality" test in measuring excessiveness. This test measures the severity of the underlying

157. See *Bennis*, 116 S. Ct. at 1009 (arguing that the justifications for strict liability in other settings are inapplicable in this instance). "There is no reason to think that the threat of forfeiture will deter an individual from buying a car with her husband—or from marrying him in the first place . . . [therefore,] [t]he absence of any deterrent value reinforces the punitive nature of this forfeiture law." *Id.* at 123-47.

158. See *supra* notes 123-46 and accompanying text.

159. See *Halper*, 490 U.S. at 447-48 (holding a civil penalty may constitute punishment under the Double Jeopardy Clause). "[C]ivil proceedings may advance punitive as well as remedial goals." *Id.* at 447.

160. Brief for Respondent at 29, *Bennis* (No. 94-8729).

161. Brief for Petitioner at 13-31, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729).

162. See Brief for Petitioner at 10, *Bennis* (No. 94-8729) (relying heavily on the innocent owner dicta in *Calero-Toledo*, 416 U.S. at 689-90).

163. *Austin*, 509 U.S. at 614.

164. United States Supreme Court Official Transcript at 53, *Bennis v. Michigan*, 116 S. Ct. 994 (1996) (No. 94-8729) (accepting oral argument regarding innocent owners and the potentially applicable culpability standards of "negligent entrustment" and "reasonable steps").

165. See *supra* note 60.

offense against the harshness of the forfeiture imposed.¹⁶⁶ A property owner must have engaged in blameworthy conduct.¹⁶⁷ Under this test, Ms. Bennis suggested the Court apply a "negligent entrustment" standard for owners claiming innocence.¹⁶⁸ Ms. Bennis entrusted the 1977 Pontiac to Mr. Bennis at the time of purchase, effectively establishing in Mr. Bennis an undeniable right of control over the vehicle. The negligent entrustment standard is satisfied if, upon entrustment, Ms. Bennis neither knew nor had reason to know Mr. Bennis would use the vehicle illegally.

In contrast, the United States, through an amicus brief to the Court, advocated adoption of the "reasonable steps" test originally suggested in *Calero-Toledo*.¹⁶⁹ The "reasonable steps" test would require a greater effort on the part of co-owners of property to prevent illegal use of the property by extending reasonable care beyond initial entrustment.¹⁷⁰ Under this test, if Ms. Bennis became aware of Mr. Bennis's illegal activity at any time prior to his arrest, she would have been required to act reasonably to prevent future illegal uses.

The Court, under either proposed proportionality test, would have certainly recognized Ms. Bennis's innocence and declared the forfeiture unconstitutionally excessive. Additionally, Michigan even conceded Ms. Bennis was wholly innocent in Mr. Bennis's offense.¹⁷¹

2. The *Austin* Instrumentality Approach: A Better Fit

Justice Scalia proposed a more historically sound approach to determine excessiveness.¹⁷² The Justice's concurring opinion in *Austin* gave birth to what is commonly referred to as the "instrumentality" or "substantial connection" test.¹⁷³ This test suggests that courts compare the relationship between the property in question and the offense which gave rise to the forfeiture proceeding.¹⁷⁴ The substantial connection test purportedly ignores the value of the property in question and the culpability of the owner.¹⁷⁵ The relevant question becomes whether the property was used closely enough in the offense to be appropriately deemed "guilty," and therefore forfeitable.

At first glance, the Bennis vehicle would seem to be a vital element in Mr. Bennis offense, and properly subject to forfeiture. However, as Justice

166. See Welling & Hager, *supra* note 7, at 865.

167. *Id.*

168. Brief for Petitioner at 24-25, *Bennis* (No. 94-8729).

169. See United States Supreme Court Official Transcript at 53, *Bennis* (No. 94-8729).

170. *Id.*

171. *Bennis*, 116 S. Ct. at 997.

172. Welling & Hager, *supra* note 7, at 856.

173. See *Austin*, 509 U.S. at 623-28 (Scalia, J., concurring in part and concurring in judgment).

174. *Id.* (Scalia, J., concurring in part and concurring in judgment).

175. See *id.* "Scales used to measure out unlawful drug sales, for example are confiscable whether made of the purest gold or the basest metal." *Id.* at 627. Justice Stevens pointed out that in *Austin*, however, the Court held that dramatic variations in the value of forfeitable property under a statutory scheme undercut the argument that such forfeitures serve remedial purposes. *Bennis*, 116 S. Ct. at 1010 (Stevens, J., dissenting).

Stevens argued, the vehicle was not an instrumentality of Mr. Bennis's offense because it was stationary—the offense could have taken place practically anywhere.¹⁷⁶ Justice Scalia's concurrence in *Austin* lends even more support to Justice Stevens's observation.¹⁷⁷ Recognizing that the guilty property fiction cannot extend indefinitely, the *Austin* Court unanimously agreed that the garage in which a single drug sale took place could not be considered an instrumentality of the relevant offense.¹⁷⁸ Under this rationale, the *Bennis* Court would have concluded that simply because the Bennis's vehicle housed a single illicit transaction, the vehicle's "culpable" connection to the offense was inconsequential.

3. Combination Approach

Ms. Bennis could have satisfied Justice Scalia's instrumentality test in another manner. The common law notion of deodand justified the forfeiture of only the value of property which caused the death of a citizen.¹⁷⁹ Therefore, if a cart ran over and killed an individual, the value of the entire cart was forfeitable to the King. If the driver fell from the cart and was killed by the wheel, however, the sovereign could only confiscate the value of the "guilty" wheel.¹⁸⁰ Similarly, in admiralty a forfeiture was limited to the offending vessel or cargo.¹⁸¹

Therefore, the Court should have separately identified Ms. Bennis's interest in the vehicle and concluded that her interest bore no "substantial connection" to the offense committed by Mr. Bennis.¹⁸² Mr. Bennis's undeniable right to control the illicit use of the vehicle is analogous to the "guilty" wheel or offending cargo in Justice Scalia's traditional forfeiture approach. Inseparable from the "offending" portion of the property, Ms. Bennis's interest should have been spared. While Justice Scalia did not include a culpability requirement in the instrumentality test, the Court could have fashioned Justice Scalia's instrumentality test to include a proportionality review.

Thus, the Court would have found in Ms. Bennis's favor under either the proportionality, instrumentality, or this Comment's "combination" approach had the Justices appropriately reached such a juncture.

176. *Bennis*, 116 S. Ct. at 1006 (Stevens, J., dissenting).

177. *Id.*

178. *Austin*, 113 S. Ct. at 621.

179. See *supra* note 20 and accompanying text.

180. See *Calero-Toledo*, 416 U.S. at 690 n.27. "Our ancestors seem fully to have perceived the hardship of inflicting such penalty on one who had been guilty of no moral or indeed legal offense; and in all cases, therefore . . . found that only to be the deodand which by its immediate contact occasioned death." *Id.*

181. See *Reed*, *supra* note 8, at 258.

182. See *Austin*, 509 U.S. at 625 (Scalia, J., concurring in part and concurring in the judgment) (concluding that civil forfeiture is a result of the merger of the deodand tradition and the belief that wrongdoers could be denied their property).

IV. CONCLUSION

Ultimately, the *Bennis* court ignored *Austin* in favor of an outdated doctrine that is constitutionally unsound when applied to innocent owners of criminal instrumentalities. Tina Bennis, probably as innocent an owner as had ever come before the Court, was the victim of flawed legal reasoning. The *Bennis* court needlessly infringed upon basic constitutional guarantees by engaging in semantics.

We may never know what persuaded the Court to revitalize the antiquated "guilty property" fiction. Perhaps the Court was concerned that its recent holdings "blurred" traditional notions of civil forfeiture.¹⁸³ If so, the *Bennis* decision did not quiet critics' voices.¹⁸⁴ *Bennis* may force the banking industry to refrain from lending to "high risk" borrowers potentially "inclined" to commit criminal acts.¹⁸⁵ Third-party lienholders may be forced to seek legislative protection whenever a forfeiture scheme is presented.¹⁸⁶ Property owners may be prosecuted for innocent entrustment. However, since many forfeiture statutes currently include innocent owner protection, *Bennis* may have a minimal practical effect on law enforcement.¹⁸⁷

The endurance of civil forfeiture appears certain. The Supreme Court, however, must identify the constitutional limits of governmental seizures. The Court now invites punishment of innocent owners but vaguely protects the property rights of convicted criminals. Americans' only hope is that their legislators refuse the Court's invitation. Civil forfeiture has proven somewhat successful in the "war on drugs," and the resulting litigation provides the Court with unique opportunities to clarify a difficult field of law. In each case, the Court must assess the delicate balance between government power and individual rights. In upholding the Constitution, the Court should have found an innocent owner exception for Tina Bennis within the Eighth Amendment Excessive Fines Clause. Unfortunately, a misguided adherence to "tradition" veiled such exception from the current Court's view.

R. Todd Ingram*

183. See Harrington, *supra* note 26, at 318.

184. See Stephen Chapman, *Almost Blind Justice: Sometimes Even the Innocent Are Guilty*, CHI. TRIB., Mar. 7, 1996, at 27; *Overmuch/Overzealous Forfeiture Law Overdue for an Overhaul*, HOUS. CHRON., Mar. 6, 1996, at 22.

185. See Steven L. Kessler, *Forfeiture and the Innocent Owner*, 214 N.Y. L.J. 101 (1995).

186. *Id.*

187. See Savage, *supra* note 140, at 48.

* The author would like to thank Lynett Henderson, Karla Robertson, Professors J. Robert Brown, Jr. and Lawrence P. Tiffany of the University of Denver College of Law, and Colby Grim, for their generous assistance with this Comment.